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IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 03-4792

UNITED STATES OF AMERICA,
Petitioner-Appellant,

v.

ZACARIAS MOUSSAOUI,
Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

REPLY BRIEF FOR THE UNITED STATES

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INTRODUCTION

The district court's unprecedented deposition orders countermand wartime decisions of the Executive concerning the detention and debriefing of alien enemy combatants held overseas. The defense never come to grips with the fundamental separation-of-powers principles violated by those orders. Nor do they acknowledge the grave practical consequences of the novel right they assert. This

appeal implicates fundamental issues about the Government's ability to rely on the criminal process as a critical tool in the continuing struggle against global terrorism. Under the approach the defense envisions, almost any indicted terrorist could stymie his prosecution by claiming a need for access to enemy combatants held overseas. In fact, under that approach, the captured al Qaeda operatives with the most critical intelligence value—those responsible for planning and coordinating attacks around the globe—could plausibly be sought by every defendant accused of carrying out the operational details of those grander plans. Counting on the Government's unwillingness to risk lives by compromising vital wartime intelligence debriefings, defendants could thereby jeopardize virtually any prosecution simply by demanding access to such "witnesses."

Nothing in the Constitution requires the Government to choose between effective prosecution of past terrorist attacks and effective intelligence gathering to prevent future terrorist attacks. Rather, the dilemma the defense paints flows from the novel proposition that the Compulsory Process Clause grants a defendant the right to testimony from an alien enemy combatant detained overseas. As explained in our opening brief, core separation-of-powers principles dictate that the courts lack the power to interfere with the Executive's conduct of war by

entering such deposition orders; compulsory process does not extend that far. As a result, there is no constitutional dilemma here that would cripple the Executive's ability to use the criminal courts as one vital tool in prosecuting terrorists.

Moreover, recognizing the limits of judicial process does not in any way conflict with defendant's right to a fair trial. The Government has been providing, and will continue to provide, the defense with classified summaries [redacted] The defense accordingly has the discoverable statements [redacted] made regarding the conspiracy that produced the September 11 attacks and defendant's role therein. To the extent any of those statements prove necessary to ensure a fair trial, the Due Process Clause remains available to ensure that defendant will have an opportunity to seek their admission into evidence.

The defense contends that they should nevertheless have the opportunity to obtain more information via depositions. But they fail to identify additional information the combatants could plausibly offer that would be exculpatory or that would not be cumulative of what already appears in the summaries. Moreover, the notion that any additional information would be forthcoming is wholly speculative

given that the combatants could well decide to invoke their Fifth Amendment privilege rather that provide self-incriminating testimony in a criminal proceeding.

Even if this Court concludes that the Compulsory Process Clause may extend judicial process into the heart of the Executive's war-making functions, and that the combatants have in their possession material, exculpatory evidence, the substitutions for the deposition testimony that the Government has proposed would fully protect defendant's rights. Moreover, the substitutions do not present an all-or-nothing choice. If this Court were to agree with the defense that the substitutions have specific flaws, they can be amended upon remand.

In contrast to the Government's proposed substitutions, which will allow the defense full access to any statements by the enemy combatants that could be deemed exculpatory, the district court's sanction would cut drastically in the opposite direction: it would deny the jury access to abundant material evidence concerning the nature of the conspiracies charged in the Indictment.

ARGUMENT

I. ALIEN ENEMY COMBATANTS HELD OVERSEAS ARE NOT WITHIN THE REACH OF THE COMPULSORY PROCESS CLAUSE.

A. Enemy Combatants Seized and Detained Overseas Are Beyond the Reach of the Court.

There can be no dispute that the capture, detention [redacted] of enemy combatants lies at the core of the war-fighting function the Constitution assigns solely to the Executive as Commander in Chief. As explained in our opening brief, in Johnson v. Eisentrager, 339 U.S. 763 (1950), the Supreme Court recognized that this fundamental allocation of powers necessarily meant that federal courts could not exercise power over alien enemy combatants held overseas. (GB 23-33).

The defense cannot, and does not, seriously contest that the district court's deposition orders, by demanding an intrusion on a vital [redacted] process in the midst of a war, would interfere with quintessentially military and intelligence judgments. The defense, moreover, fails to confront the grave practical consequences of the novel right of access they propose: it will enable terrorist defendants, by seeking to depose [redacted] al Qaeda leaders held overseas, to guarantee that they will either hobble [redacted] efforts abroad or

the criminal prosecution against themselves.[1] It would thus produce exactly what the Supreme Court determined to prevent by enforcing clear separation-of-powers principles in Eisentrager: "a conflict between judicial and military opinion highly comforting to enemies of the United States." 339 U.S. at 779.

Instead, while the defense does not dispute that separation-of-powers concerns lie at the heart of Eisentrager, the defense claims (DB 24-27) that Eisentrager's principles cannot apply in this criminal case. Their claim is meritless.

First, the defense claims that any separation-of-powers concerns somehow dissipate because the Executive chose to bring this prosecution. (DB 24–25). The

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[1]This Court should reject the defense suggestion (DB 5) that the Executive could avoid the issues presented in this case by designating defendant an enemy combatant. That suggestion invites the court to invade one of the most sensitive areas of decisionmaking reserved to the Executive Branch. The national security and foreign policy concerns that would be implicated in considering military process for defendant are the province of the Executive and necessarily involve many considerations the judiciary is ill-equipped to evaluate. For example, many of our allies might not extradite terrorists to the United States if they were to be placed in military custody upon their arrival. Moreover, "an accused has no constitutional right to choose the offense or the tribunal in which he will be tried." Colepaugh v. Looney, 235 F.2d 429, 433 (10th Cir. 1956). Compare Ex Parte Quirin, 317 U.S. 1 (1942) (approving treatment of Nazi saboteurs as enemy combatants) with Haupt v. United States, 331 U.S. 864 (1947) (upholding treason conviction arising from same events).

mere fact that the Government initiated this case, however, in no way diminishes the improper interference with Executive functions that would result if the district court were to disrupt the [redacted] environment of an enemy combatant to conduct a video deposition. The decision to prosecute in no way diminishes the Executive's authority to exercise distinct Article II powers nor does it supply the courts with the authority to intrude on Executive functions in a way that otherwise would be inappropriate.[2] Indeed, it should be apparent from other

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[2]The defense argument concerning the "extra-territorial" reach of the writ of habeas corpus ad testificandum is a red herring. (DB 19–21). It is true that a district court's process for issuing a writ of habeas corpus ad testificandum is (in contrast to the Great Writ, see Schlanger v. Seamans, 401 U.S. 487, 490-91 (1971)) not limited to the district court's territorial jurisdiction and so extends to other districts within the United States. But it is equally true that a district court's process does not reach aliens abroad. See, e.g., United States v. Zabaneh, 837 F.2d 1249, 1259-60 (5th Cir. 1988) (and cases cited). The defense points to no case law supporting a rule that compulsory process may extend to aliens abroad by simply directing process to the federal government. Indeed, the rule is to the contrary for purposes of the Great Writ with respect to aliens abroad. Compare Eisentrager (the writ does not issue against Secretary of Defense with respect to enemy aliens held abroad) with Ex parte Hayes, 414 U.S. 1327 (1973) (the writ can issue against Secretary of Army with respect to citizens held abroad). The cases that the defense cites to support their theory are not directly on point and at least one contradicts their position. United States v. Greco, 298 F.2d 247, 251 (2d Cir. 1962), holds that a witness in Canada is not within the reach of the Compulsory Process Clause. Moreover, United States v. Filippi, 918 F.2d 244 (1st Cir. 1990), states in dictum only that the Government can violate the Fifth and Sixth Amendments by blocking a witness abroad from voluntarily attending a trial. The subpoena power and compulsion were not at issue, id. at 247, and the court

contexts that the decision to prosecute provides no basis for ignoring separation-of-powers principles. As explained in our opening brief, for example, it is settled that an alien who is overseas is simply beyond the compulsory process power of the courts. The mere fact that the Government initiates a criminal prosecution does not permit the courts to ignore separation-of-powers principles and order the Government to embark on negotiations with a foreign government to secure such a witness for trial.

There is certainly no basis for issuing orders that interfere with the much more important and sensitive executive functions related to intelligence gathering in the midst of a war. Those separation-of-powers concerns identified by the Supreme Court in Eisentrager are unaffected by the fact that the Government initiated this prosecution. They demand the same result here as in Eisentrager: the courts lack power to interfere with the Executive's determinations concerning the detention of aliens as enemy combatants overseas.

Second, the defense asserts that the Government cannot invoke Eisentrager

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found that in the circumstances of that case, the Government could not point to its immigration responsibilities to justify its conduct, id. at 248. Here, of course, there is an ample non-prosecutorial justification for limits on access to the enemy combatants held abroad.

in these circumstances without shirking "its own constitutional obligations." (DB 27). But that assertion begs the very question presented: whether defendant has any compulsory process right to obtain the testimony of an alien enemy combatant held overseas.[3] It is well established that the right to compulsory process is not absolute and that it does not grant defendant the right to any and all witnesses he might like to have appear. For example, a defendant does not have a compulsory process right to secure the presence of an alien who is overseas. See, e.g., Zabaneh, 837 F.2d at 1259–60. The defense contends that this analogy is inapt (DB 21-22) because in cases such as Zabaneh, the witness is not "in the [redacted] control of the Government." But those cases nonetheless illustrate that

[3]Defendant's appeals to the Fifth and Eighth Amendments, 18 U.S.C. § 3005 and the All Writs Act are equally meritless. Neither the Fifth nor the Eighth Amendment provides an independent right to secure the attendance of witnesses broader than that which the Compulsory Process Clause provides. See Sattazahn v. Pennsylvania, 537 U.S. 101, 116 (2003). Nor does 18 U.S.C. § 3005. Originally enacted in 1790, before the adoption of the Sixth Amendment, that statute was a stop-gap measure to ensure that capital defendants would have the same right that the Compulsory Process Clause would soon guarantee. See Act of April 30, 1790, ch. 9, § 29, 1 Stat. 112, 119. Courts thus have construed predecessors to the current Section 3005 (which are essentially identical) as equivalent to the compulsory process right the Sixth Amendment guarantees. See, e.g., Casebeer v. Hudspeth, 121 F.2d 914, 916 (10th Cir. 1941). Finally, the All Writs Act cannot confer on defendant any right to obtain witness testimony that is otherwise unavailable to him under the Constitution's separation-of-powers.

separation-of-powers concerns limit the reach of the Compulsory Process Clause. Certainly, the Executive could engage in negotiations with foreign governments to secure the presence of the witnesses, but no court has found it within its power to order the Executive to do so. Cf. United States ex rel. Keefe v. Dulles, 222 F.2d 390, 394 (D.C. Cir. 1954). There is therefore no basis for ordering the Executive to provide access here, where the separation-of-powers problem raised by the defense request for enemy combatant testimony is far more serious than that posed by a defense request for the testimony of an ordinary alien witness.

Cases like Zabaneh, moreover, make clear that defendant would have no claim to access to these enemy combatants were he prosecuted for murder in state court. Although the Compulsory Process Clause applies equally in state and federal court, see, e.g., Rock v. Arkansas, 483 U.S. 44, 52 (1987), the enemy combatants in federal control overseas would lie outside the state court's process, and the state court could not order the federal government to permit access. See Smith v. Cromer, 159 F.3d 875, 883 (4th Cir. 1998); see also Kasi v. Angelone, 300 F.3d 487 (4th Cir.), cert. denied, 537 U.S. 1025 (2002); United States v. Williams, 170 F.3d 431 (4th Cir. 1999); 28 C.F.R. § 527.31(b) (Bureau of Prisons warden may transfer federal prisoner to state pursuant to writ ad testificandum

"only when satisfied . . . federal interests . . . will not be interfered with, or harmed."). The absence of any Compulsory Process Clause right to secure testimony of the enemy combatants in a state prosecution underscores that the Clause guarantees a defendant access equal to the court's process, not an absolute right to compel the attendance of witnesses. The absence of such a right in state court also highlights another perverse consequence of the defense's theory here: only state prosecutors and state courts (not federal prosecution) could successfully address the conduct of foreign terrorists that satisfies the elements of the most heinous federal crimes.

The defense also invokes the principle that the Compulsory Process Clause and 18 U.S.C. § 3005 grant the defendant the same process as "'is usually granted to compel witnesses to appear on behalf of the prosecution.'" (DB 18 (quoting 18 U.S.C. § 3005)). But that principle does not assist the defense because they do have the same ability as the prosecution to secure testimony from these enemy combatants. The prosecution has made clear that, but for the military necessity of detaining these enemy combatants abroad, the prosecution would call them. See, e.g., (JAC557). The prosecution cannot call them as witnesses for the same reason that defendant cannot: the military imperative to hold these individuals as enemy

combatants renders them unavailable for a domestic prosecution.

The defense attempt to distinguish the witness-immunity cases is similarly unavailing. If the defendant's constitutional right to obtain exculpatory testimony were absolute, then it would trump the separation-of-powers concerns raised by compelling the Executive to confer immunity on a witness who could offer such testimony. But the courts have held otherwise. See GB 34, 36 (citing cases). Just as the Executive has the power to make the allegedly exculpatory testimony available in the witness immunity cases, but cannot be compelled by the courts to exercise it at the cost of foregoing the prosecution of a possibly guilty defendant, so too here the Executive cannot be compelled to produce the enemy combatants at the cost of gathering intelligence critical to the ongoing war against al Qaeda.

Indeed, this case follows a fortiori from the immunity cases because the defense envisions interference with Commander-in-Chief and intelligence-gathering functions distinct from the prosecutorial function, while the immunity cases involve only a distinct exercise of the prosecutorial power. Moreover, the costs to the [redacted] process of granting access are certain, but the countervailing benefit to the defendant is speculative, as the combatants could invoke the privilege against self-incrimination. See, e.g., United States v. Iribe-

Perez, 129 F.3d 1167, 1173-74 (10th Cir. 1997). Defendant, in fact, is better off than many defendants who unsuccessfully seek to procure the testimony of alleged co-conspirators whom the Government refuses to immunize, because the defense has already been given summaries of [redacted] discoverable statements regarding the conspiracies with which he is charged and can use them to prepare a defense and seek to admit them to the extent they are necessary to a fair trial. See Part I.B, infra.

Third, and finally, relying on cases such as United States v. Andolschek, 142 F.2d 503 (2d Cir. 1944), the defense argues that the Government created the predicament in which it finds itself and "cannot avoid choosing between safeguarding its secrets and its prosecution." (DB 29). But the Andolschek line of cases is inapposite. Andolschek involved an effort merely to seek disclosure of information (documents) in the Government's possession, not an effort to breach fundamental separation-of-powers principles by having the courts interfere with core Executive decisions concerning the ongoing conduct of war. The Supreme Court, moreover, made clear in United States v. Valenzuela-Bernal, 458 U.S. 858 (1982), that where the Government has such competing responsibilities in multiple executive functions, the Andolschek rationale will not prevail. See id. at 863, 866.

What is true for enforcement of the immigration laws in Valenzuela-Bernal is true, a fortiori, for the war-time intelligence efforts at issue here.[4]

B. Defendant Can Receive A Fair Trial Without Obtaining The Depositions Of The Enemy Combatants.

Contrary to the defense characterization of this case as one "of withheld evidence" (DB 34), the Government has not denied the defense access to the information [redacted] that pertains to the charges laid out in the Indictment. To the contrary, the Government has been complying with its obligations under Brady v. Maryland, 373 U.S. 83 (1963), by providing the defense with all information it has obtained [redacted] that could arguably fall under Brady.[5] As a result, defendant will have

[4]The defense claims that Valenzuela-Bernal is inapplicable because it "was a 'lost' evidence case where the Government no longer had the evidence," unlike here. (DB 29-30 n.12). The Valenzuela-Bernal Court never stated, however, that the "lost" nature of the evidence was necessary to its holding that competing responsibilities of the Executive Branch must be taken into account in evaluating a defendant's request for access to allegedly exculpatory testimony. Indeed, the dissent clearly did not read the majority opinion as containing such a limitation, contending that the decision undermined the Andolschek line of cases in which the evidence was not "lost." Valenzuela-Bernal, 458 U.S. at 881-82 (Brennan, J., dissenting).

[5]Defendant suggests that the Government is not complying with Brady because the witnesses themselves are exculpatory "so they must be produced." (DB 34). Brady requires the production of exculpatory evidence, however, and a witness is not evidence. See Brady, 373 U.S. at 86-87.

the opportunity to seek admission of the combatants' versions of events to the extent they are necessary to a fair trial. Indeed, the Government has proposed substitutions pursuant to the Classified Information Procedures Act, 18 U.S.C. App. 3 (CIPA), which could be used for this purpose.

Nothing in the Fifth Amendment's guarantee of due process demands overriding the separation-of-powers concerns highlighted in Eisentrager. A holding that due process demands such a result could not be reconciled with the rules that trials can proceed in the absence of exculpatory testimony from foreign witnesses and witnesses who invoke their Fifth Amendment privilege. Moreover, the opportunity the defense will have to seek admission [redacted] these enemy-combatant witnesses [redacted], and the Government's good-faith, compelling basis for preventing them from testifying, together place this case in a wholly different category from those the defense cites (DB 33), all of which involved the intentional destruction of evidence crucial to the defense. See, e.g., United States v. Cooper, 983 F.2d 928, 932 (9th Cir. 1993) (bad-faith destruction of laboratory equipment leaving defendant with no "comparable, alternative means of" defense).

II. THE DISTRICT COURT ERRED BY FAILING TO BALANCE THE GOVERNMENT'S OVERWHELMING NATIONAL SECURITY INTEREST AGAINST DEFENDANT'S FAILURE TO SHOW THE NECESSITY OF THE COMBATANTS' TESTIMONY.

A. The Government's Interest in Protecting National Security Is Overwhelming.

As explained in our opening brief, where the Government has a legitimate interest in foreclosing access to a potential witness, a court must "balanc[e] the public interest in protecting the flow of information against the individual's right to prepare his defense." Roviaro v. United States, 353 U.S. 53, 62 (1957). Recognizing, as they must, the grave national security interests at stake in this case, the defense does not attempt to dispute them. Contrary to the defense suggestion (DB 64), the Government is not arguing that these undisputedly compelling interests trump defendant's right to a fair trial; rather, we argue that on the specific facts of this case, those interests outweigh defendant's asserted need to depose these particular purported witnesses, because the defense has failed to make any substantial showing that the witnesses would provide material, exculpatory testimony.

B. The District Court's Order Is Not Supported by Any Showing of Material and Exculpatory Testimony.

The district court erred by applying the wrong legal standards in evaluating materiality. Contrary to the defense, the ruling on materiality is not simply an evidentiary ruling reviewed for "abuse of discretion." (DB 16 & n.7; 41 & n.14). The district court did not rule on the admissibility of a piece of evidence. Rather, it ruled on whether a potential witness would provide material, exculpatory testimony, and that ruling involves a mixed question of fact and law that is reviewed de novo. See, e.g., United States v. Kates, 174 F.3d 580, 583 (5th Cir. 1999); United States v. Rivalta, 925 F.2d 596, 598 (2d Cir. 1991).

It is well settled that for evidence to be deemed material, there must be "a reasonable probability that [it] would have produced a different verdict." Strickler v. Greene, 527 U.S. 263, 281 (1999). The defense seeks to avoid the rigors of that standard by claiming that a different, lower standard should apply when materiality is evaluated before trial, rather than in the post-trial context. (DB 45 & n.16). But the Supreme Court has rejected just such an approach and concluded that "[l]ogically the same standard must apply at both times." United States v. Agurs, 427 U.S. 97, 108 (1976).

In addition, where, as here, the question at issue is the need for trial

testimony, the materiality standard necessarily requires that the evidence be admissible at trial. Potential testimony that is inadmissible—such as hearsay—"is by definition not material, because it never would have reached the jury and therefore could not have affected the trial outcome." United States v. Ranney, 719 F.2d 1183, 1190 (1st Cir. 1983). Thus, contrary to the defense view (DB 45-46 & n.16), the standard articulated in Wood v. Bartholomew, 516 U.S. 1 (1995), is precisely on point. It establishes that inadmissible evidence cannot be material for it can have "no direct effect on the outcome of trial." Id. at 6.

The defense mistakenly contends (DB 19 n.9; 45) that the district court was correct in ruling that objections based on the admissibility of the evidence are premature. Such objections are not at all premature because Rule 15 effectively imposes the same standards that would apply at trial. Rule 15 depositions "are only to be taken to preserve the testimony for use at trial." United States v. Ismaili, 828 F.2d 153, 159 (3d Cir. 1987). Just as at trial, the deposition is subject to the Federal Rules of Evidence, see Fed. R. Crim. P. 15(f), and parties may make objections to testimony, see Fed. R. Crim. P. 15(e). There can be no basis, therefore, for even proceeding with a Rule 15 deposition to elicit hearsay. For the same reasons that a district court must generally assess admissibility before

deeming a potential witness's testimony material, a Rule 15 deposition is not warranted where the anticipated testimony is inadmissible as hearsay or otherwise. See United States v. Hernandez-Escarsega, 886 F.2d 1560, 1570 (9th Cir. 1989) (Rule 15 deposition inappropriate where the expected testimony "was in some respects irrelevant and in others cumulative and possibly inadmissible as hearsay."); Ismaili, 828 F.2d at 162 (similarly finding that "the hearsay nature of the [] witnesses affects the materiality of their testimony"). Adhering to this approach is especially critical in this case, where permitting the depositions to go forward would disrupt [redacted] the enemy combatants and risk terminating the Government's ability to obtain information regarding future attacks. This Court should not permit that radical step in the absence of a showing that the anticipated testimony would be material, exculpatory and admissible.

In fact, many of the statements the defense and the district court point to in support of the theory that [redacted] would provide material testimony would, in fact, be inadmissible, [redacted]

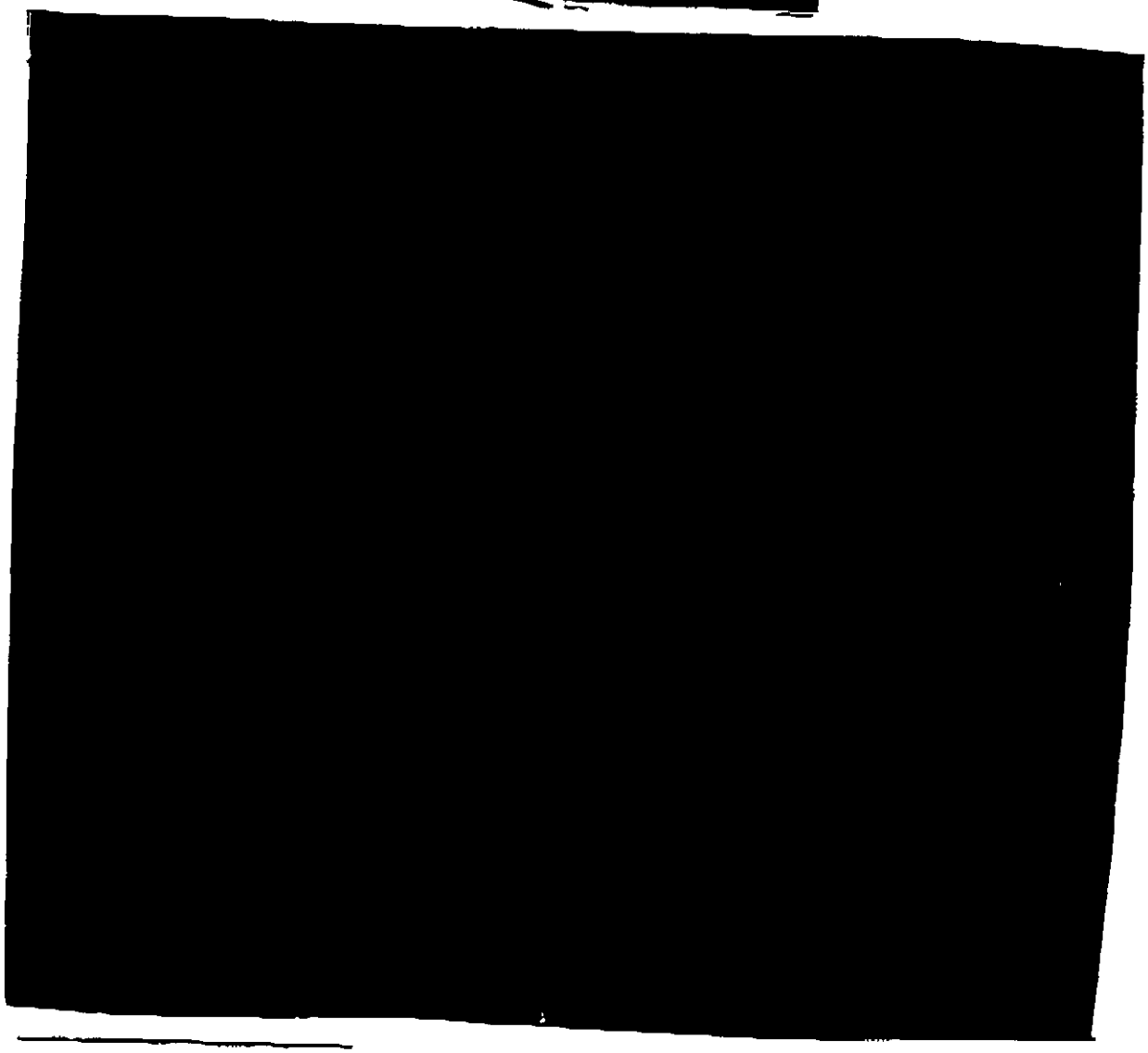
[redacted] These statements [redacted] would constitute inadmissible hearsay and hence cannot be material. See, e.g., United States v. Wilkerson, 84 F.3d 692, 696 (4th Cir. 1996).

The district court also erred in failing properly to take into account the likelihood that the enemy combatants would attempt to invoke the Fifth Amendment and remain silent. While the damage to the [redacted] process from permitting access to the combatants is 100% certain, the likelihood that the witnesses would testify, rather than invoke their privilege, is minimal. The defense relies heavily on the court's "finding" that there was "significant

evidence" that [redacted] would testify. (DB 46-47 & n.18.). But the sum total of "evidence" on this point consists of the two facts [redacted] Neither of those facts, however, can give rise to any rational inference that, when he knows he has been placed before an American court where his voluntary statements can expose him to the death penalty, [redacted] will blithely implicate himself in capital crimes. The same holds true for [redacted]

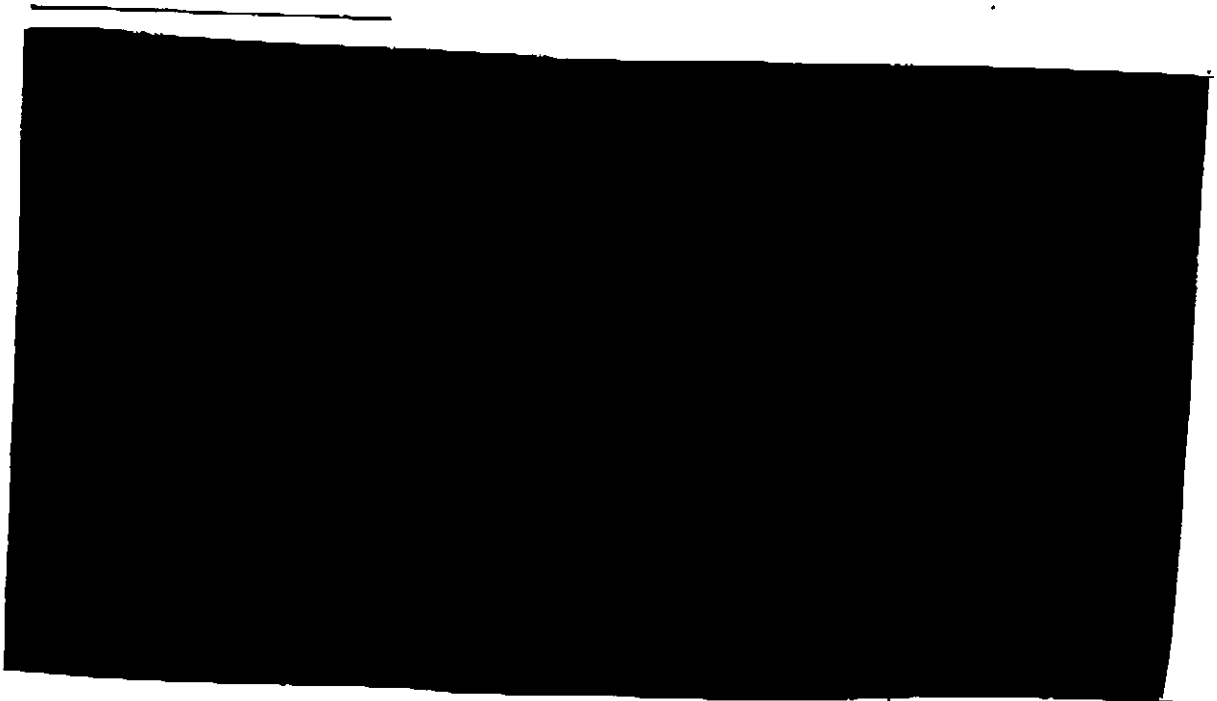
As for specific claims about the supposedly exculpatory information the combatants will provide, the district court erroneously presumed that because the combatants played [redacted] roles in the September 11 plot, they must have relevant and exculpatory testimony. That reasoning is fallacious. The combatants' roles may suggest that they could offer relevant and even interesting testimony, but their roles do not in and of themselves support a finding that they have exculpatory testimony. See, e.g., United States v. Iribe-Perez 129 F.3d 1167, 1173 (10th Cir. 1997). And mere speculation that they might provide some exculpatory detail is not sufficient to establish defendant's need for a witness. See, e.g., United States v. Caballero, 277 F.3d 1235, 1241 (10th Cir. 2002).

[redacted]



In the face of the fundamentally inculpatory nature of the statements [redacted] the defense cites several categories of purported exculpatory evidence that the combatants could offer. None suffices to meet their burden.

[redacted]



[redacted]

III. THE DISTRICT COURT ABUSED ITS DISCRETION BY CATEGORICALLY REJECTING THE GOVERNMENT'S SUBSTITUTIONS.

A. The Proposed Substitutions Comply with CIPA.

Even if this Court concludes that the Compulsory Process Clause extends to the combatants and that they would provide material testimony under the correct standard, it should hold that the district court abused its discretion in rejecting the Government's proposed substitutions for their prospective testimony. The

substitutions should be accepted because, consistent with CIPA, they provide defendant with substantially the same ability to assert his defense as would the prospective deposition testimony. See 18 U.S.C. App. 3 §6(c)(1). The Government's proposed substitutions are reliable, accurate and complete, and, in any event, can readily be modified to satisfy particular concerns of the district court or the defense.

The defense attack on the substitutions boils down to their position that information set forth in a document could never be the precise equivalent of live testimony. CIPA does not, however, require absolute equivalency. In enacting the substitution provision, Congress did not intend "precise, concrete equivalence." H.R. Conf. Rep. No. 96-1436, at 12 (1980), reprinted in 1980 U.S.C.C.A.N. 4310. Indeed, "[t]he fact that insignificant tactical advantages could accrue to the defendant by the use of the specified classified information should not preclude the court from ordering alternative disclosure."[10] Id. at 12-13; 1980 U.S.C.C.A.N.

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[10]The defense mistakenly contends (DB 38-39) that the common law does not permit substitutions of the kind the Government has proposed. While no case precisely like this one has arisen before, CIPA did not invent the concept of substitutions. For example, in cases involving material evidence that the State destroyed, the defendant cannot make out a due process violation without establishing that "comparable evidence" is unavailable. California v. Trombetta, 467 U.S. 479, 489 (1984); see Buie v. Sullivan, 923 F.2d 10, 13 (2d Cir. 1990)

at 4310-4311. The flexibility Congress built into CIPA is particularly appropriate here, where the countervailing national security interests are so great and given the reality that deposition testimony would not even be available if the combatants were produced but refused to testify.

That the substitutions do not permit an evaluation of the combatants' demeanor, therefore, is clearly not dispositive. See, e.g., United States v. Salim, 855 F.2d 944 (2d Cir. 1988) (permitting use of deposition transcript that inculpated defendant). Many exceptions to the rules of hearsay, of course, permit the jury to consider statements by witnesses without evaluating their demeanor, typically when there are reasons to believe the statements are reliable.[11] As we explained in our opening brief (GB 67-68 & nn.19, 20, 21), the process [redacted] strives to generate accurate information, and that

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("the substance of [the prospective defense witness's] exculpatory evidence was presented through Officer Smith for the jury's consideration."). Because the substitutions will permit defendant the opportunity to place before the jury the stories the combatants have to tell, they should be considered "comparable" to deposition testimony and thus sufficient to ensure that defendant receives a fair trial.

[11]While it is true that with substitutions defendant is unable to rely on demeanor evidence to support a contention that the combatants are credible witnesses, this is counterbalanced by the inability of the Government to undermine their credibility via cross-examination.

information is reported accurately.[12]

The defense further claims that the substitutions would "mislead the jury" (DB 70), because they do not explain that the [redacted] statements [redacted] None of these contentions, however, provides a sound basis for rejecting the substitutions themselves. To the extent the defense's concerns have merit, they can be addressed in jury instructions that could provide some context for the jury's evaluation of this evidence.

Next, the defense contends that the substitutions are incomplete in that they allegedly omit exculpatory information contained in the [redacted] summaries [redacted]

[redacted]

Neither of these contentions has merit.

[redacted]

[redacted] Once again, moreover, sorting out the minutiae such as the defense contention that those five words are critical is something that should be handled in the district court if the basic concept of substitutions has been approved.

[redacted]

[redacted] the defense has provided no substantial basis to conclude that the details would be exculpatory. Mere speculation about the possibility of exculpatory information is not sufficient to establish defendant's need for a witness in the first place, see Caballero, 277 F.3d at 1241, and it similarly cannot show that there is some deficiency in a substitution proposed by the Government. Given the compelling government interests [redacted] and given that the defense cannot establish prejudice since their assertion that they could uncover additional exculpatory information from the combatants is speculative, this Court should hold that the substitutions are sufficiently comprehensive to protect defendant's right to a fair trial.

Citing United States v. Fernandez, 913 F.2d 148 (4th Cir. 1990), the defense argues (DB 75) that the substitutions "shackle the defense 'to a script written by the prosecution.'" Their reliance on Fernandez is misplaced. There, this Court found that the content of the proposed substitutions so radically distorted the classified information they were designed to replace that they foreclosed or fatally weakened key defenses that could have been effectively presented via the

classified information. Id. at 157-61. Unlike the substitutions in Fernandez, the substitutions the Government has proposed here mirror the content of the statements to which they correspond. Because the substitutions reflect rather than distort [redacted] they protect defendant's right to present his defense.

If this Court agrees with the defense and the district court that the substitutions omit exculpatory information contained in the [redacted] summaries, they can be revised to meet the Court's concerns. Except for an initial, jarringly one-sided attempt at crafting substitutions [redacted] that was rejected by the district court (SAC279), the defense has chosen not to offer any suggestions for substitutions. Instead, they have adhered to the hard line that no substitution will ever be sufficient.[13] Because the [redacted] summaries from which the substitutions are drawn substantially reflect [redacted] this Court should affirm the capacity of the substitution process to protect defendant's right

[13]The defense unfairly takes the Government to task (DB 79) for not submitting revised substitutions. The Government has not done so because the district court categorically rejected the very concept of substitutions as an inadequate replacement for live testimony. (2JAC302-03).

to a fair trial and give the Government the opportunity to revise the substitutions if the Court finds them deficient in some regard.

B. The District Court Abused Its Discretion by Imposing an Evidentiary Sanction Unrelated to Any Possible Prejudice Defendant Could Suffer from Use of the Substitutions at the Guilt Phase.

The district court emphasized that "a trial is supposed to be a truth-seeking process." (JAC620). The district court derailed the truth-seeking function of the trial, however, by prohibiting the Government from presenting "any evidence or argument that the defendant was involved in, or had knowledge of, the planning or execution of" the September 11 attacks. (2JAU330). By drastically limiting the evidence the Government may present regarding the September 11 attacks, the sanction will prevent the jury from hearing key evidence that is highly probative of the horrifying intent and objectives of defendant and his co-conspirators. This sanction highlights the perverse nature of the district court's rejection of the substitutions, which, by including the statements [redacted] that are pertinent to the conspiracies charged in this case, would permit defendant the opportunity to present evidence regarding his alleged lack of involvement in, or knowledge of, the events of September 11 to the extent the [redacted] statements would support that defense.

1. The Government has not waived objections to the sanctions.

The defense's claim that the Government has somehow waived any objection to the novel and far-reaching evidentiary sanction imposed by the district court simply because the Government chose not to object to the more routine proposal of dismissal of the Indictment is meritless. The defense claim of waiver is flawed for two reasons.

First, the Government has unwaveringly opposed the district court's rulings that (1) the Sixth Amendment affords defendant the right to compel the Government to produce the enemy combatants held abroad to obtain their testimony, (2) the enemy combatants would offer admissible, material, exculpatory testimony, see, e.g., JAC348-416, JAC554-588, JAC707-725; 2JAU340-42, 2JAU355-57, 2JAC291-311, (3) that defendant's need for these purported witnesses could outweigh the compelling national security concerns that demand precluding access, and (4) that the Government's substitutions are not adequate to protect any rights defendant does have with regard to these witnesses. Moreover, in its pleading addressing the defense's proposals for sanctions, the Government went to great lengths to re-emphasize its disagreement with the findings that led to the need for the court even to consider sanctions in the first place. 2JAC486-87.

These repeated objections to any sanction defeat the invited-error doctrine and application of the plain-error standard. See United States v. Haywood, 280 F.3d 715, 725 (6th Cir. 2002) (rejecting plain error analysis); United States v. Negron, 967 F.2d 68, 71 (2d Cir. 1992) (rejecting invited error doctrine); United States v. Kepner, 843 F.2d 755, 760 (3d Cir. 1988) (same).

Second, the defense theory rests critically on the proposition that lack of objection to the greater sanction (dismissal) must convey lack of objection to any lesser, or less drastic, sanction, no matter what it happens to be, and no matter what independent errors it may incorporate. But that is plainly not true. It must be recalled that, under the pleading schedule arranged with the parties' consent below, the Government was responding to a specific defense proposal for sanctions. That proposal contained two options: dismiss the Indictment or, in the alternative, dismiss the death notice. Given this Court's prior ruling, it was imperative for the Government, if its interests were to be protected, to ensure that the sanctions took the form of an immediately appealable order. As the Government explained, therefore, to ensure immediate review, the Government chose not to oppose dismissal. But that does not imply blanket consent for the district court to do anything short of dismissing the case; far less did it invite the

court to follow any such course. Any independent errors introduced by the district court's sua sponte fashioning of its own sanction (to which the parties had no opportunity to respond) are fully subject to appeal here.

2. The District Court's Sanction Is Unrelated to the Supposed Error It Is Meant to Address.

As explained in our opening brief (GB 74-80), the district court's sanction bears no relation to any prejudice defendant would suffer if the Government's proposed substitutions were used. Instead, the district court's effort to wholly excise any evidence concerning September 11 from this case rests on a misconstruction of the broad conspiracies actually charged in the Indictment and on a misapplication of fundamental principles of conspiracy law. (GB 76-80). Indeed, even if it were true that the enemy combatants at issue here would unequivocally say that defendant was not part of the specific September 11 operation [redacted] it would still be fully permissible under standard principles of conspiracy law for the Government to put on evidence of the September 11 attacks to demonstrate the objectives, motives, and methods of participants in the overall conspiracy of which defendant was a part.

Although the district court went to great lengths to characterize the charged conspiracies in different ways, the Indictment speaks for itself. It alleges that the defendant, as a member of al Qaeda, participated in that terrorist organization's conspiracy to kill Americans. While the September 11 attacks lie at the core of the Indictment, the charged conspiracies are much broader than just those attacks. JAU102-32. Any act by defendant in furtherance of the conspiracy that manifests his knowing participation in it renders him liable, regardless of whether he knew the full details of the conspiracy. See United States v. Burgos, 94 F.3d 849, 861 (4th Cir. 1996) (en banc) ("defendant's connection to the conspiracy need only be 'slight'" because "a defendant need not know all of his coconspirators, comprehend the reach of the conspiracy, participate in all the enterprises of the conspiracy, or have joined the conspiracy from its inception."); United States v. Roberts, 881 F.2d 95, 101 (4th Cir. 1989) ("one may become a member of the conspiracy without full knowledge of all of its details, but if he joins the conspiracy with an understanding of the unlawful nature thereof and willfully joins in the plan on one occasion, it is sufficient to convict him of conspiracy, even though he had not participated before and even though he played only a minor part.").

Thus, the purported testimony of the enemy combatants does nothing to undercut defendant's guilt for the charged conspiracies. [redacted] This evidence would actually inculpate the defendant in the guilt phase and would not even warrant a jury instruction regarding multiple conspiracies. See United States v. Stockton, __ F.3d __, 2003 WL 22700875 at *5 (4th Cir. Nov. 17, 2003) ("single overall conspiracy can be distinguished from multiple independent conspiracies based on the overlap of actors, methods, and goals"); United States v. Bowens, 224 F.3d 302, 307-08 (4th Cir. 2000) (upholding refusal to give multiple conspiracy instruction where "there is an agreement to engage in one overall venture"); United States v. Kennedy, 32 F.3d 876, 884 (4th Cir. 1994) ("A multiple conspiracy instruction is not required unless the proof at trial demonstrates that appellants were involved only in 'separate conspiracies *unrelated* to the overall conspiracy charged in the indictment.'") (emphasis in original).

[redacted] But the only support cited for this assertion is an earlier defense pleading. Of course, the burden rests upon the defense to establish that the purported testimony is material and exculpatory. Other than rhetoric, the defense does not explain how the purported testimony puts defendant's actions outside the charged conspiracies. The district court's sanction precluding all evidence and argument regarding defendant's involvement in, or knowledge of, the September 11 attacks thus bears no rational relationship to the impact of the combatants' purported testimony at the guilt phase of the trial, and, consequently, constituted an abuse of discretion.

IV. THE DISTRICT COURT ABUSED ITS DISCRETION BY DISMISSING THE DEATH NOTICE.

Like the district court, defendant's arguments regarding the dismissal of the death penalty notice focus upon defendant's capital eligibility instead of its propriety as a sanction. (DB 87-93). As explained in our opening brief, the district court abused its discretion in dismissing the death notice because that sanction, too, bears no relation to any prejudice that defendant would suffer from

the absence of deposition testimony from the enemy combatants in question.[14] The Government has explained that defendant is eligible for the death penalty under two specific prongs of the Federal Death Penalty Act (FDPA). Nothing that the enemy combatants would say could affect either theory for capital-eligibility in this case. See GB 85-92.

The defense bases its arguments in support of the sanction on the assertion that "the Government has not cited a single case in which a defendant, convicted *solely* of conspiracy, has been found death eligible in relation to a homicide

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[14]The Government's objections to this sanction have not been waived for all the reasons described above. See Part III(B)(1). In addition, there is a further reason objections to dismissal of the death notice have not been waived. The district court struck the death penalty notice not only as a sanction for lack of the enemy combatants' testimony, but also after ruling as a matter of law that the Government could not establish defendant's capital-eligibility under the FDPA and the Eighth Amendment. (2JAU323-26). The district court addressed defendant's capital-eligibility without providing notice to the parties that it would do so as part of the sanctions and after having failed to rule for more than a year and a half on defense motions attacking the death penalty notice. (2JAU36, 2JAU167-196). By deciding issues of defendant's capital-eligibility without providing notice to the parties that it would do so, the district court deprived the Government of an opportunity to address the impact of the resolution of these legal issues upon the sanction, further undercutting any claim that the plain-error and invited-error doctrines could apply here. In fact, because the Government has consistently argued that defendant *is* eligible for the death penalty under the FDPA, it has clearly preserved objection to that aspect of the district court's ruling. (2JAU167-96).

committed by other members of the conspiracy in an event in which the Defendant did not actually participate." (DB 87-88) (emphasis in original). This essentially repeats the district court's theory that "it simply cannot be the case that Moussaoui . . . can lawfully be sentenced to death for the actions of other members of al Qaeda." (2JAU326). As noted above, this theory focuses more upon the defendant's eligibility for the death sentence as a pure matter of federal death penalty law than upon the propriety of dismissing the death notice as a sanction. In any event, to the extent the argument bears upon analysis of the sanction, the defense claims that both as a matter of constitutional law and under the terms of the FDPA, any evidence that defendant was not actually part of the specific September 11 attack makes him ineligible for capital punishment. Neither argument has any merit.

As a matter of constitutional law, defendant is fully eligible for the death penalty under the Supreme Court's decision in Tison v. Arizona, 481 U.S. 137 (1987). In Tison, the defendants were brothers, who, along with other members of their family, planned and effected the escape of their father from prison where he was serving a life sentence for having killed a guard during a previous escape. The defendants entered the prison with a chest filled with guns; armed their father

and another convicted murderer; later helped to abduct, detain, and rob a family of four; and watched their father and the other convict murder the members of that family with shotguns. Neither defendant made any effort to help the victims as their father murdered them. Tison, 481 U.S. at 139-41. The defendants complained that their death sentences offended the Eighth Amendment because they neither intended to kill the victims nor inflicted the fatal gunshot wounds. The Supreme Court rejected this argument and held that the Eighth Amendment is not offended by a death sentence for a defendant whose participation in the crime is major and whose mental state demonstrates reckless indifference to the value of human life. Id. at 158. In so doing, the Court wrote: "A critical facet of the individualized determination of culpability required in capital cases is the mental state with which the defendant commits the crime. Deeply ingrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more serious is the offense, and, therefore the more severely it ought to be punished." Id. at 156.

Following Tison, the Eighth Circuit in Fairchild v. Norris, 21 F.3d 799 (8th Cir. 1994), held that a defendant may be sentenced to death even if the defendant was not physically present at the time of the murder where the defendant's actions

leading up to the murder were sufficient to demonstrate that he exhibited a reckless indifference to human life. Id. at 804. In Fairchild, the defendant and his accomplice followed the victim to her car, kidnaped her at gunpoint (the accomplice had the gun), and drove her to a deserted house. The defendant and his accomplice raped the victim, but the defendant left the house believing that his accomplice was going to leave the victim alive. The defendant went to the car and was rummaging through the victim's purse when his accomplice shot the victim to death. Id. at 803. The Eighth Circuit ruled that the demands of Enmund and Tison had been met by the defendant's actions leading up to the murder, noting that "actual presence or close proximity of the defendant is but one factor among many a jury may consider in sentencing a felony murderer to death." Id. at 803-05.[15]

Most applicable to this case is the Tison Court's observation that some crimes could be so horrible that *any* major participation in them could satisfy both participation and culpability factors:

> Although we state these two requirements separately, they often overlap. For example, we do not doubt that there are some felonies as to which one could properly

[15]Although the defendants in Tison and Fairchild were convicted of felony-murder instead of conspiracy, like defendant here, their capital-eligibility derives from accomplice liability.

> conclude that any major participant necessarily exhibits reckless indifference to the value of human life. Moreover, even in cases where the fact that the defendant was a major participant in a felony did not suffice to establish reckless indifference, that fact would still often provide significant support for such a finding.

Tison, 481 U.S. at 158 n.12.

Defendant's participation in the conspiracies resulting in the September 11 attacks clearly render him constitutionally eligible for the death penalty under Tison. This defendant joined a terrorist organization dedicated to the world-wide murder of innocent Americans and other Westerners, trained in al Qaeda's camps to learn the skills needed to carry out these murders, traveled across the globe to the United States with the specific intent to kill, took flight training so that he could use an aircraft as a fully fueled bomb, purchased weapons and tools for use during the hijackings/murders, lied to cover up the conspiracy at the time of his arrest to ensure that his collaborators could fulfill their mission of murder, and then rejoiced in its success. If there is any felony that could meet the description set out by the Supreme Court in Tison of a crime in which "any major participant necessarily exhibits reckless indifference to the value of human life," it is a world-wide conspiracy to commit murder, the self-proclaimed objective of which is to kill Americans anywhere in the world they can be found. See (JAU110 ¶ 9). To

allow the defendant to evade the death penalty because his personal acts in furtherance of the conspiracy did not more obviously contribute to the grisly events of September 11, 2001, would allow him to benefit from the sheer magnitude of the crime, thereby contravening the teaching of Tison.[16]

Defendant is also eligible for the death penalty under the terms of the FDPA as set forth in 18 U.S.C. § 3591(a)(2). As explained in our opening brief, the defendant's lies at the time of his arrest qualify as the necessary "act" for purposes of subsection (C) and his participation in the conspiracy qualifies as the "act" for both subsections (C) and (D). (GB 86-92). Defendant challenges both theories by wrongly mixing statutory and constitutional eligibility.

Although acknowledging that defendant's lies constitute an "act" for purposes of subsection (C), defendant complains that the Government relies on defendant's entire "conduct within the broader al Qaeda conspiracy to establish major participation." (DB 89). Indeed, we do, because the entirety of defendant's conduct is at issue when examining the constitutional question of defendant's culpability, while the more narrow question of identifying a specific act exists

[16]As the district court accurately noted, "the Court in Tison found only that major participation in an underlying felony is sufficient, but not necessary, to render a defendant death eligible." 2JAU324.

under the statute.

Defendant also challenges the Government's ability to prove that the loss of life on September 11 was a direct result of his lies. While the issue of causation should ultimately be resolved by the jury, the Government will meet its burden by demonstrating that, had the defendant been truthful (even assuming enemy combatant testimony to the effect that defendant did not know the details of the September 11 plot), security countermeasures would have been implemented that would have prevented the attacks, and the September 11 hijacker/pilots would have been identified and apprehended before the attacks.

Defendant next takes issue with the Government's argument that defendant's participation in the conspiracy constitutes the "act" under subsections (C) and (D) by simply reiterating the district court's holding that this argument fails as a matter of statutory construction because "the terms 'act' and 'offense' must be given independent meaning within the context of the [FDPA]." (DB 91) (quoting 2JAU 325, n. 20). Without repeating our earlier argument here, see (GB 89-92), we note that the plain language of the FDPA includes a mitigating factor that suggests that a conspirator can be eligible for the death penalty. Section 3592(a)(3) sets forth the following mitigating factor:

> (3) Minor participation. – The defendant is punishable as a principal in the offense, which was committed by another, but the defendant's participation was relatively minor, regardless of whether the participation was so minor as to constitute a defense to the charge.

First, this mitigating factor refers to participating in an "offense" and not an "act," which diminishes defendant's argument that the FDPA relies solely on "acts" to make one death eligible. Second, and more important, the existence of this mitigating factor demonstrates that Congress envisioned capital liability for those vicariously liable such as accomplices and conspirators. See United States v. Gooding, 67 F.3d 297, 1995 WL 538690, at **6 (4th Cir. 1995) (unpublished) (mitigating factor in 21 U.S.C. § 848(m)(3) regarding the role of the defendant in the offense (which is identical to the mitigating factor in § 3592(a)(3)) demonstrates "that Congress contemplated that aiders and abettors might face death . . . .") (copy attached). Indeed, the Eighth Circuit, while upholding a death sentence under the FDPA, has held:

> . . . an aggravating factor can be based on liability as an accessory. Allowing a jury to consider that the defendant acted jointly in determining aggravating circumstances is consistent with the rule that a defendant can be sentenced to death in some circumstances even though he only aids and abets the killing.

United States v. Ortiz, 315 F.3d 873, 901 (8th Cir. 2002) (citing Tison); see also

United States v. Paul, 217 F.3d 989, 997 n. 4 (8th Cir. 2000) (discussing accomplice liability under the FDPA). Thus, for these reasons as well as those set forth in our opening brief, defendant's participation in the conspiracy can constitute the "act" under subsections (C) and (D).[17]

In sum, because the combatants' purported testimony would not render defendant ineligible for the death penalty, and because the substitutions offer the defense substantial flexibility to introduce [redacted] statements in an effort to avoid a death sentence at the selection phase, the district court erred in concluding that defendant is constitutionally entitled to deposition testimony at the penalty phase and thus abused its discretion in striking the death notice.

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[17]Defendant tries to counter the Government's assertion that the mens rea requirement and the "finding of death resulting" in the FDPA perform the narrowing function by arguing that the conspiracies are specific intent crimes and, therefore, "would add nothing to the legal equation if the 'act' were the conspiracy itself." (DB 91-92 n. 43). While it is true that the charged conspiracies are specific intent crimes, the specific intent is to commit the object of the conspiracy (i.e., act of terrorism, aircraft piracy, destruction of aircraft, use of weapons of mass destruction), not an intent to kill which the threshold findings require. Thus, the mens rea requirement does, indeed, serve a narrowing function under the FDPA. See United States v. Webster, 162 F.3d 308, 322, 355 (5th Cir. 1998).

CONCLUSION

For the foregoing reasons, and the reasons stated in our opening brief, the district court's deposition orders and sanctions order should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that this brief has been prepared using Times New Roman typeface, and fourteen point.

2. I further certify that this brief does not exceed 11,000 words (specifically, 10,799 words), exclusive of table of authorities, table of contents, any addendum containing statutes, rules or regulations, this certificate, and the certificate of service.

3. I understand that a material representation can result in the Court's striking the brief and imposing sanctions. If the Court so directs, I will provide an electronic version of the brief and/or a copy of the word or line print-out.

Robert A. Spencer
Assistant United States Attorney

ADDENDUM

(Cite as: 67 F.3d 297, 1995 WL 538690 (4th Cir.(Va.)))

NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA4 Rule 36 for rules regarding the citation of unpublished opinions.)

United States Court of Appeals, Fourth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Derek Lamont GOODING, a/k/a Zack, a/k/a Wolf, Defendant-Appellant.
United States of America, Plaintiff-Appellee,
v.
Samuel Clive Phillips, a/k/a David, a/k/a Culture, a/k/a Jungle, Defendant-Appellant.
United States of America, Plaintiff-Appellee,
v.
Cashmere Cazeau, a/k/a Claudy, Defendant-Appellant.
United States of America, Plaintiff-Appellee,
v.
Nigel Nicholas Douglas, a/k/a Junior, Defendant-Appellant.
United States of America, Plaintiff-Appellee,
v.
John Henry Lewis, a/k/a Murdock, Defendant-Appellant.
United States of America, Plaintiff-Appellee,
v.
Terry Leon Edwards, Defendant-Appellant.
United States of America, Plaintiff-Appellee,
v.
Jean Claude Oscar, a/k/a Chuck, Defendant-Appellant.
United States of America, Plaintiff-Appellee,
v.
Arnold Mark Henry, a/k/a B, Defendant-Appellant.
United States of America, Plaintiff-Appellee,
v.
Frantz Oscar, a/k/a Mark, a/k/a Oscar Frantz, Defendant-Appellant.

Nos. 94-5405, 94-5406, 94-5407, 94-5408, 94-5409, 94-5410, 94-5444, 94-5445, 94-5448.

Sept. 11, 1995.

ARGUED: Douglas Fredericks, Norfolk, Virginia; Walter Bruce Dalton, Norfolk, Virginia; Paul Henderson Ray, Virginia Beach, Virginia; Donald A. Harwood, New York, New York; John Orlin Venner, Virginia Beach, Virginia; David Wayne Bouchard, Chesapeake, Virginia, for Appellants. ON BRIEF: Duncan R. St. Clair, III, ST. CLAIR, MILLER & MARX, P.C., Norfolk, Virginia, for Appellant Cazeau; Lawrence H. Woodward, Jr., SHUTTLEWORTH, RULOFF, GIORDANO & KAHLE, Virginia Beach, Virginia, for Appellant Edwards; Danny Shelton Shipley, Norfolk, Virginia, for Appellant

Robert Joseph Seidel, Jr., Assistant United States Attorney, Kevin Michael Comstock, Assistant United States Attorney, Norfolk, Virginia, for Appellee. ON BRIEF: Frantz Oscar. Helen F. Fahey, United States Attorney, Arenda L. Wright Allen, Assistant United States Attorney, Norfolk, Virginia, for Appellee.

E.D.Va.

AFFIRMED.

Before HAMILTON, MICHAEL, and MOTZ, Circuit Judges.

OPINION

PER CURIAM:

**1 After a jury trial that lasted forty-two days, all nine defendants were convicted for conspiracy to distribute cocaine. *See* 21 U.S.C. § 846. Eight of the nine defendants were convicted for distributing cocaine. *See* 21 U.S.C. § 841(a)(1). Seven were convicted of using a firearm in relation to drug trafficking or a crime of violence. *See* 18 U.S.C. § 924(c)(1). Three, Jean Oscar, Frantz Oscar, and Arnold Henry, were convicted of engaging in a Continuing Criminal Enterprise ("CCE"), murder in furtherance of a CCE, and making a place available for distribution of cocaine. *See* 18 U.S.C. at §§ 848, 848(c)(1)(A), 856(a). And finally, Jean Oscar, alone, was convicted of being a felon in

possession of a firearm. *See* 18 U.S.C. § 922(g)(1).

After conviction, the jury considered, and rejected, the government's request that Jean and Frantz Oscar ("the Oscar brothers") and Arnold Henry be put to death. Subsequently, the court sentenced each defendant individually. The Oscar brothers and Arnold Henry, the capital defendants, all received life sentences plus 45 years. Derek Gooding and Samuel Phillips received life plus five years. Nigel Douglas received life. Cashmere Cazeau and John Lewis received a prison term of 25 years and four months. Terry Edwards was sentenced to 12 years and seven months.

All nine defendants appeal. Finding no error, we affirm.

I. *Background.*

The Oscar brothers, Arnold Henry, Derek Gooding, Samuel Phillips, and Eric Carroll, an unindicted co-conspirator, were founding members of a crack cocaine ring (the "group") operating out of Brooklyn, New York. In 1991 the group relocated to Norfolk, Virginia, where it opened a stash house at 635 West 36th Street. It established a crack sales operation with day and night shifts. The group's main distribution point was a pair of houses on West 34th Street in Norfolk. Later, the business expanded to include satellite locations in Virginia Beach, on 26th Street in Norfolk, and on Bagnell Road in Norfolk. With four distribution points and numerous employees, including defendants John Lewis, Nigel Douglas, Cashmere Cazeau and Terry Edwards, the group was moving over ten thousand dollars worth of crack every week.

The beginning of the end for the group came in the early morning hours of March 26, 1993. One of the group's employees, Gwendolyn Johnson, was robbed of her crack and $895. After the robbery, Johnson called Jean Oscar, the group's leader. Jean Oscar and his top lieutenants, Frantz Oscar and Arnold Henry, went immediately to Johnson's apartment at 1763 Campostella Road in Norfolk.

There, in front of at least six witnesses (including a 15-year-old boy), Jean Oscar started interrogating those present about the robbery. He focused his attention first on Alma Baker. During the interrogation, Jean Oscar became enraged and smashed Maggie Keene, an onlooker, on the back of the head with a pistol. Then Jean Oscar ordered his brother and Henry to bind Baker's hands and mouth with duct tape, take off her shoes and socks, expose the tip of an extension cord, and wrap the wire around her toes. At this point, Jean Oscar stopped asking questions and the three men tortured Baker with electric shocks. Baker's body shook from the repeated jolts of electric current. When they stopped torturing Baker, her hair was smoking.

**2 As Baker lay in agony on the floor, the Oscar brothers and Henry turned their attention to Wayne Ashley, Baker's boyfriend. They forced Ashley to the floor, stripped him naked from the waist down, heated a fork red-hot on the kitchen stove, and then slapped the fork onto Ashley's exposed genitals.

Despite the torture, neither Ashley nor Baker identified the robbers. So Jean Oscar took a revolver from his brother, walked over to Baker, put the gun to her head, and killed her with a single round. After the killing Jean Oscar ordered the half-dozen observers to clean up the mess. He then put Baker's corpse, along with Ashley, into his car. That was the last time Ashley was seen alive.

At 3:30 a.m. witnesses heard gunshots near the CSX coal piers in Newport News. About 4:00 a.m. Wayne Ashley's body was discovered lying near the coal piers with two bullet holes in his head. At 7:00 a.m. Alma Baker's body was found near an exit ramp off Interstate 664 in Hampton, Virginia.

Meanwhile, police had talked to Maggie Keene, who was found huddled in the corner of a 7-11 store near Campostella Road. Keene's story led police to 1763 Campostella Road, the site of the murder and torture. By the time police arrived, however, group members had cleaned the apartment and concocted a story about how robbers had murdered Baker.

These events led police to focus more attention on Jean Oscar. On April 20, 1993, they stopped him driving a rental van on a drug run to New York City. During the stop, officers recovered a Chinese SKS assault rifle and $14,000 in cash. Later that day, the Norfolk Police Department executed search warrants at four locations in Norfolk: the two West 34th Street distribution points; the 26th Street satellite office; and 1009 Baltimore Street,

Apartment B ("Apartment B"), the dwelling from which Jean Oscar left in his van.

The stop and the searches led to the arrest and indictment of all nine defendants. They stood trial and were convicted of the various crimes mentioned at the beginning. This appeal followed.

II. *Challenges to the Search at Apartment B .*

Defendants first contend that the search at Apartment B was issued and executed in violation of the Fourth Amendment. With respect to issuance, they argue that the warrant affidavit lacked sufficient facts to establish probable cause. With respect to execution, they argue that the police improperly exceeded the authorized scope of the search. We reject both assignments of error.

As for the argument that the warrant was improperly issued, we note that "our task is to determine whether the magistrate has a substantial basis for the decision" to issue the warrant. *United States v. Lalor*, 996 F.2d 1578, 1581 (4th Cir.) (citation omitted), *cert. denied*, 114 S.Ct. 485 (1993). In making this determination, "we accord the magistrate's decision 'great deference,' " and we will interpret the affidavit supporting the warrant in a "commonsense manner." *Id.*

**3 Applying these principles here, we find that the affidavit contained more than enough facts to support the magistrate's decision to permit a search at Apartment B. The affidavit related that Jean Oscar, with some of his associates, left Apartment B only four hours earlier to make a drug run to New York. It noted that Oscar and certain of his associates had been arrested in their rented van with an assault rifle and large quantities of cash. The affidavit also revealed that one of Jean Oscar's recently arrested subordinates had admitted that Oscar and his top lieutenants lived in the apartment. Finally, the affidavit offered corroborating observations by police (during surveillance) who had watched drug delivery vehicles come and go from 1009 Baltimore Street, Apartment B's location. These facts connected Apartment B to the leaders of an extensive and ongoing drug conspiracy within a recent time frame. They gave the magistrate a substantial basis to believe that drugs would be found in Apartment B. We therefore conclude that the warrant was properly issued.

To address defendants' argument that the warrant was improperly executed, we mention a few additional facts. The warrant itself authorized the police to search for cocaine. Four Norfolk police officers executed the search. They knocked on the door of Apartment B and announced their presence. No one answered. Instead, someone turned off the lights and someone peeked out a window. Using a battering ram, police then forcibly entered the apartment. Inside, the police detained defendants Samuel Phillips (after a brief fight) and Frantz Oscar. They then searched the apartment and seized an assault rifle, ammunition, pagers, two sets of digital scales, 237 grams of crack cocaine in 10 separate packages, records of drug transactions, photographs of people using drugs, photographs of armed persons, a camera, some undeveloped 35mm film, and a VHS video cassette.

The plain view doctrine permits the police to seize evidence not specified in a warrant only if (1) the officer seizing the evidence did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed, (2) the incriminating nature of the evidence was immediately apparent, and (3) the officer had a lawful right of access to the object. *Horton v. California*, 496 U.S. 128 (1990).

The police entered Apartment B under a lawful warrant. That warrant authorized the police to search for cocaine. In conducting that authorized search, the police were permitted to examine any and all areas and items where the drug might readily be concealed. *United States v. Barnes*, 909 F.2d 1059, 1069 (7th Cir.1990) (citation omitted). Thus, the only issue in this case is whether the evidentiary value of the objects listed above was "immediately apparent" to the police. That is a factual determination. It depends on the totality of the circumstances and the credibility of the testifying officers. The district court was in the best position to assess these matters. Therefore, we will only reverse a determination that the nature of an item was "immediately apparent" in the event of clear error. *See United States v. Gray*, 83 F.2d 320 (4th Cir.1989) (holding that a district court's factual findings at a suppression hearing will be reviewed only for clear error).

**4 Here, there was no clear error. The district court suppressed the camera, the undeveloped film and the VHS video cassette. It found that the

incriminating nature of these objects was not readily apparent. In contrast, the district court permitted the prosecution to use the assault rifle, the ammunition, the pagers, both sets of digital scales, the records of drug transactions and the incriminating photographs. All of these items, except for the records, are so patently incriminating that they warrant no discussion. As for the transaction records, we do not perceive clear error in the district court's determination that the incriminating nature of those documents was immediately apparent to the officers who saw the documents as they searched for drugs. *See Barnes*, 909 F.2d at 1070.

III. *Challenges to the Jury.*

Defendants next contend that the prosecution exercised its peremptory strikes on the basis of race, in violation of the anti-discrimination rule laid down by *Batson v. Kentucky*, 476 U.S. 79 (1986). The six defendants who did not face the possibility of a death sentence further contend that the strikes for cause for anti-death penalty views denied them an impartial jury. We reject both assignments of error, in turn.

Batson established that the Constitution forbids the prosecution from striking jurors because of their race. 476 U.S. at 89. In this case the government exercised 18 peremptory strikes. Four of these strikes excluded blacks. Each of these persons expressed candid reservations about his or her ability to apply the death penalty. The prosecution also struck six whites who expressed similar reservations. Moreover, one of the four black jurors stricken knew some of the defense attorneys. Another of the four black jurors worked for a business which had recently been prosecuted by the U.S. Attorney's office in Norfolk. In any event, four of the twelve jurors who actually passed judgment in this case were black.

The government may use its peremptory challenges to exclude persons who express hesitancy about their ability to apply the death penalty. *Brown v. Dixon*, 891 F.2d 490, 496-98 (4th Cir.1989), *cert. denied*, 495 U.S. 953 (1990). Moreover, the government's right to use its peremptory challenges to exclude persons acquainted with defense counsel, or who may harbor bias against the prosecution, has never been questioned. Given these facts, it is not surprising that the district court rejected appellants' *Batson* challenge. We see no reason to disturb that decision on appeal.

The claim by the six non-capital defendants that the strikes for cause for anti-death penalty views deprived them of an impartial jury fails in light of *Buchanan v. Kentucky*, 483 U.S. 402 (1987). The claim arises from the fact that jurors, of any race, who said that they could not vote to impose death because of their religious or moral opposition to that penalty were struck from the venire for cause. To the extent that this argument is distinct from an argument that the non-capital defendants should have been tried separately from the capital defendants, *Buchanan* settles the matter. There, the Supreme Court rejected the notion that the Constitution requires separate juries to pass judgment over capital and non-capital defendants tried in the same proceeding. 483 U.S. at 414-420. This necessarily disposes of the non-capital defendants' claim that the strikes for cause violated their right to an impartial jury.

IV. *Severance.*

**5 The six non-capital defendants further contend that they should have been tried separately from the capital defendants. They complain that the trial revolved around the brutal murders of Baker and Ashley. This, the non-capital defendants say, prejudiced them because they were mere "bit players," "unable to differentiate themselves in the jurors' minds from the stars." Brief of Appellants at 25. Moreover, the six non-capital defendants say that their defense was inconsistent with the capital defendants' defense. Neither contention requires reversal. The facts belie the assertion that the six non-capital defendants were merely bit players. Gooding, Phillips and Lewis were important figures in Jean Oscar's organization over an extended period of time. These men participated in major crimes in furtherance of the conspiracy. On one occasion, for example, the three men helped Jean Oscar beat Eric Carroll nearly to death. Douglas, the fourth man in this group, supervised a shift at one of the organization's distribution points. He managed a number of underlings and moved large amounts of drugs. Even Edwards and Cazeau were more than mere bit players; although not supervisors, they were certainly supporting actors in the conspiracy, working as salaried street pushers. In any event, the contention on appeal is that the non-capital defendants, as a group, were bit players and entitled

to severance. As a group, however, the noncapital defendants were considerably more than bit players.

In general, defendants charged in the same conspiracy should be tried together. *United States v. Brooks*, 957 F.2d 1138, 1145 (4th Cir.) (citation omitted), *cert. denied*, 112 C. Ct. 3051 (1992). Antagonistic or mutually exclusive defenses among co-conspirators do not automatically require severance. *Zafiro v. United States*, 113 S.Ct. 933, 938 (1993). Instead, Federal Rule of Criminal Procedure 14 requires severance "only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." And, in any event (as in *Zafiro*), the non-capital defendants have failed to articulate any specific instances of prejudice. Instead, they rest their argument on the conclusory allegation that the defenses of the two groups of defendants were antagonistic.

The non-capital defendants are entitled to severance only if they can make a strong showing of prejudice from a joint trial. *See id.; United States v. Goldman*, 750 F.2d 1221, 1225 (4th Cir.1984). A showing of compelling prejudice requires more than a showing that joinder makes for a more difficult defense. *Id.* "The fact that a separate trial might offer a better chance of acquittal is not a sufficient ground for severance." *Id.* Moreover, under Rule 14, the trial court's decision to grant or deny severance will not be overturned absent an abuse of discretion. *Brooks*, 957 F.2d at 1145.

**6 Because we believe the non-capital defendants have understated their roles and because they have failed to identify with specificity the prejudice they suffered by a joint trial, we affirm the district court's decision to deny severance.

V. *Challenge to a Jury Instructions.*

Two defendants, Frantz Oscar and Arnold Henry, challenge the jury instructions that permitted the jury to convict them for aiding and abetting Jean Oscar in the murder of Alma Baker or Wayne Ashley in violation of 21 U.S.C. § 848(e)(1)(A). Frantz Oscar and Henry argue that aiding and abetting liability is simply not available in prosecutions under this statute. The crime, they say, does not exist.

We disagree. Section 848(e)(1)(A) provides that any person who intentionally kills an individual in furtherance of a CCE must be imprisoned for at least 20 years and may receive the death penalty. There is no indication in the subsection that Congress intended to override the general provision that an aider and abettor "is punishable as a principal." 18 U.S.C. § 2. Moreover, section 848(m)(3), in the same statute, provides:

> In determining whether a sentence of death is to be imposed on a defendant, the finder of fact shall consider mitigating factors, including the following: ...
> (3) The defendant is punishable as a principal (as defined in section 2 of Title 18) in the offense, which was committed by another, but the defendant's participation was relatively minor, regardless of whether the participation was so minor as to constitute a defense to the charge.

Section 848(m) demonstrates that Congress contemplated that aiders and abettors might face death for violating section 848(e)(1)(A). *See United States v. Villarreal*, 963 F.2d 725, 731 (5th Cir.) (holding that Congress intended accomplice liability to attach for violating section 848(e)(1)(B), which proscribes intentionally killing a law enforcement officer), *cert. denied*, 113 S.Ct. 353 (1992). Thus, when read as a whole, section 848 disproves Frantz Oscar's and Henry's argument that they cannot be held criminally liable as aiders and abettors. Accordingly, the challenged jury instructions were proper.

VI. *Remaining Issues.*

We have reviewed carefully the remaining issues raised by appellants and find them to be without merit.

* * *

The convictions and sentences are affirmed.

AFFIRMED

67 F.3d 297 (Table), 1995 WL 538690 (4th Cir.(Va.)), Unpublished Disposition

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CERTIFICATE OF SERVICE

I certify that on November 21, 2003, two copies of the foregoing Brief of the United States were served on the Court Security Officer for service on the following counsel:

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